

1995

# Marvin A. Dalton, JR., Plaintiff/Petitioner, vs. Brian G. Herold Defendant/Respondent : Brief of Respondent

Utah Court of Appeals

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Mark Dalton Dunn; Kevin D. Swenson; Dunn & Dunn; Attorneys for Respondent.

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UTAH SUPREME COURT

BRIEF

DOCKET NO. 950414

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IN THE UTAH SUPREME COURT

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MARVIN A. DALTON, JR.,

Plaintiff/Petitioner,

vs.

BRIAN G. HEROLD,

Defendant/Respondent.

Case No. 950414

Court of Appeals  
No. 941070-CA

Third District Court  
No. 920903329 PI

Judge Leslie A. Lewis

---

**BRIEF OF DEFENDANT/RESPONDENT**

---

**APPEAL FROM A MEMORANDUM DECISION OF THE UTAH COURT OF APPEALS**

---

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### **STATEMENT OF JURISDICTION**

The defendant/respondent Brian G. Herold ("hereinafter referred to as "Herold") recognizes that this court has jurisdiction over the issues set forth in the petition for a writ of certiorari filed by the plaintiff/petitioner Marvin A. Dalton, Jr. ("hereinafter referred to as "Dalton"). Herold, however, takes issue with the statement of jurisdiction submitted by Dalton questioning jurisdiction because Herold directly appealed the trial court's granting of an additur. Additionally, that issue is not appropriately before this court in that it was not set forth in the petition for a writ of certiorari.

### **STATEMENT OF THE ISSUES**

Issue: Did the Court of Appeals err in viewing "the evidence and all reasonable inferences drawn therefrom in the light most favorable to [the jury's] verdict?"

Standard: For there to be a successful attack of a jury verdict, all of the evidence supporting the verdict must be marshaled and demonstrated that, even viewing the evidence in the light most favorable to that verdict, the evidence is insufficient to support the jury's verdict. *Crookston v. Fire Insurance Exchange*, 817 P.2d 789, 800 (Utah 1991); *Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985). The facts are to be viewed and recited in the light most favorable to the jury's verdict whenever an appeal is considered that involves a jury's verdict. *Crookston* at 794; *Von Hake* at 769. "[W]hen the damages are not so inadequate as to indicate a disregard of the evidence by

the jury, a court is not **empowered to entertain** a motion for an additur." *Dupuis v. Nielson*, 624 P.2d 685, 686 (Utah 1981). (Emphasis added.)

Issue: Did the Court of Appeals err by not allowing oral argument?

Standard: Oral argument on appeal is not a right bestowed on the parties. The Court of Appeals may exercise its discretion not to hear argument if the "decisional process would not be significantly aided." Rule 29 of the Utah Rules of Appellate Procedure.

#### **STATEMENT OF THE CASE**

##### **NATURE OF THE CASE, COURSE OF PROCEDURES AND DISPOSITION IN THE COURTS BELOW**

On June 11, 1992, Dalton filed a complaint of negligence against Herold. Dalton asserted that on October 15, 1990, Dalton was riding his motorcycle northbound on 900 West in Salt Lake City, Utah. Herold was making a left-hand turn from 900 West onto North Temple. An accident occurred between the parties in the middle of the intersection. At the time of the accident, Dalton was not wearing a protective helmet. Dalton claimed that he suffered personal injuries with associated past and future medical expenses.

Shortly after the accident, Dalton was incarcerated. Later, Dalton entered a plea of guilty to the third degree felony of burglary. Prior to trial, the parties agreed that Dalton would not make any claims for lost wages or make any reference to how his alleged physical limitations would relate to employment in exchange for Herold not attempting to introduce evidence regarding Dalton's incarceration or criminal record. (R.373) Accordingly, the

jury was not presented with any evidence of whether Dalton could afford to obtain proper medical care or, in fact, receive free medical care while in jail.

On May 5, 1993, and pursuant to Rule 68(b) of the Utah Rules of Civil Procedure, Herold filed an offer of judgment in the amount of \$15,000. (R. 62-64) That offer was rejected by Dalton and this matter was tried to a jury on May 17 through 19, 1993. The jury's verdict was considerably below the offer of judgment.

After the conclusion of the evidence at trial, the court directed the jury to find that Herold was negligent. The remaining issues were submitted to the jury on a special verdict forms. The jury found Dalton to have been negligent and both parties' negligence to be a proximate cause of Dalton's injuries. The jury concluded that Dalton was 20% at fault and that Herold was 80% at fault. Finally, the jury awarded special damages in the amount of \$3,000 and general damages in the amount of \$5,000. (R. 292)

Upon motions of the plaintiff, the trial court found the amount of the jury's verdict to be "clearly inadequate in light of the evidence presented at the trial" and "not consistent with any actual special damages." Dalton's motion for additur was granted and the court increased the award of special damages from the jury's verdict of \$3,000.00 to a total of \$22,910.24. The court did not alter the portion of the jury's verdict which found Dalton 20% at fault for his own injuries or the award of \$5,000.00 in general damages.

On September 27, 1993, the trial court issued a memorandum decision granting Dalton's motion for additur. (See Exhibit A-4 in the petitioner's



appendix.) On January 24, 1994, the trial court entered its final judgment and order regarding plaintiff's post-trial motion for verified costs and expenses. (See Exhibit A-5 in the petitioner's appendix.)

Herold appealed the District Court's memorandum decision and judgment. That appeal was addressed by the Utah Court of Appeals. In an effort to determine whether the trial court was "empowered to entertain a motion for an additur", the Court of Appeals correctly examined the evidence and determined that "the evidence does not compel a finding that reasonable persons would have reached a different measure of damages." That court cited *Dupuis v. Nielson*, 624 P.2d 685, 686 (Utah 1981). The Court of Appeals found that the "trial court should never have considered the motion for additur since the record does not show that the jury disregarded the evidence." (See the memorandum decision of the Court of Appeals attached as Exhibit A-1 in the petitioner's appendix.) The trial court's additur of \$19,910.24 was reversed and the original jury award of special damages in the amount of \$3,000 was reinstated.

It should be noted that Dalton's presentation of what he considers to be the "correct standard of review applied to a trial court's ultimate decision to grant an additur" was placed squarely before the Court of Appeals both in the brief of the appellee and in his petition for rehearing. Dalton set forth the same basis in his petition for certiorari on page 2 of his petition for rehearing when he stated:

In short, [the Court of Appeals] mistakenly reviewed the verdict directly without considering the intermediate action

[additur decision] by the trial court. See *Andreason v. Aetna Casualty Company*, 848 P.2d 171, 174 (Utah App. 1993). Had the court applied the correct standard of view [sic], it would have reached a different conclusion.

Additionally, the petition for rehearing sets forth Dalton's argument that an "oral presentation explaining the correct standard of review ... would have prevented this Court from picking the wrong standard of review ... ." (See petition for rehearing pp. 8, 9.) Despite Dalton's extensive briefing on the same issues that are now before this court, the Court of Appeals denied his petition for rehearing.

In the brief of Dalton, **for the first time**, he maintains that Herold had no right to appeal the trial court's additur. Herold never "accepted" the additur in any fashion. Dalton admits that "this issue was not presented to the Court of Appeals." (See Brief of Plaintiff/Petitioner at page 21.) Additionally, the claim that Herold "accepted" the additur and is banned from appealing that judgment was not set forth in Dalton's petition for a writ of certiorari. Accordingly, because those issues are not properly before the court at this time, Herold will not address that issue herein unless this court requires additional briefing. See *Savage v. Educators Ins. Co.*, 908 P.2d 862, 864 n. 3 (Utah 1995).

#### **STATEMENT OF FACTS**

1. On October 15, 1990, immediately prior to the accident, Herold was the second car stopped at a red light at the intersection of 900 West and North Temple in Salt Lake City, Utah. (R. 611)

2. Herold was facing south and intending to make a left-hand turn. (R. 612)

3. At the time of the accident, the traffic signals at the intersection in question did not provide a left-hand turn arrow.

4. Dalton was northbound on his motorcycle on 900 West. (R. 640)

5. Dalton was not wearing a protective helmet. (Dalton has never worn a helmet while riding his motorcycle.) (R. 684)

6. As soon as the light turned green, Herold followed the vehicle in front of him in making a left-hand turn. (R. 680)

7. While approaching the intersection, Dalton had actually seen the green light for approximately four to six seconds before he passed the beginning of the left-hand turn lane for northbound traffic which is a considerable distance before the intersection. (R. 677-678)

8. Dalton had a clear view of Herold and the car ahead of Herold. (R. 680)

9. In attempting to stop, Dalton claimed to have locked up his brakes, yet no skid marks were left by his motorcycle. (R. 680-681)

10. Dalton hit the very end of the Herold vehicle on its right rear quarter panel. (R. 685)

11. At the scene of the accident, Dalton refused medical aid. (R. 685-686)

12. Later on the day of the accident, Dalton was treated at the emergency room of Holy Cross Hospital and released. (October 15, 1990).

13. While at the emergency room, Dalton did not wish to have a plastic surgeon consulted. (R. 240, p. 2 of Holy Cross emergency department report).

14. Dalton was next examined by Dr. James Morgan, an orthopedic surgeon, almost two months later on December 6, 1990. (R. 748-749)

15. Dr. Morgan saw Dalton only one other time on January 24, 1991; by that time Dalton's knee injury had returned to about pre-injury level, although he continued to have numbness of his face, right arm and hand. (R. 756)

16. Dalton saw Dr. Richard Hodnett, a plastic surgeon, on only one occasion on December 17, 1990; no treatment was rendered. (R. 766)

17. Dr. Hodnett asked Dalton to return; Dalton did not return. (R.784)

18. It is the policy of Dr. Hodnett's office to "call and ask the patient to come in for a repeat exam." (R. 785)

19. In December of 1990, Dr. Hodnett "thought that, at that late of date, [Dalton] may need more extensive treatment than he would have needed if [Dr. Hodnett had] seen him within the first couple weeks of when [the accident] happened." (R. 769)

20. When asked at trial whether Dalton needed surgery approximately two and one-half years after Dr. Hodnett last saw Dalton and had x-rays taken, Dr. Hodnett stated: "It's difficult, since I haven't been able to examine Mr. Dalton". (R. 781)

21. Dalton received no treatment from any of the physicians who examined him (Dr. Morgan, Dr. Hodnett, Dr. Cosby, Dr. Mikesell, and Dr. Stadler) for his alleged injuries related to the accident in question. (R. 696)

22. Dalton did not follow his doctors' recommendations which would have mitigated his damages. (R. 702)

23. When Dalton saw Dr. Michael P. Cosby, an oral and maxillofacial surgeon, on December 16, 1991 for his temporal mandibular joint concerns, Dalton had one tooth actually rotted down to the roots. (R. 827-28)

24. When Dalton saw Dr. L. Vaun Mikesell, his second expert in the area of oral and maxillofacial surgery, shortly before trial on February 23, 1993, Dalton had eight teeth that had severe cavities and may need to be extracted. (R. 858)

25. In a letter to Dalton's attorney dated December 26, 1991, Dr. Cosby recommended that Dalton have his teeth cleaned. (R. 849)

26. Dalton did not follow the recommendation to have his teeth cleaned. (R. 702)

27. Dr. Cosby recommended that Dalton exercise appropriate dental hygiene. (R. 849)

28. Dalton "just turned lazy" and did not exercise appropriate dental hygiene. (R. 702)

29. Dr. Cosby recommended the removal of non-restored teeth and the restoration of restorable teeth. (R. 849)

30. Dalton did not obtain appropriate dental care. (R. 702)

31. Dr. Cosby recommended that Dalton be evaluated for splint therapy. (R. 849)

32. Dalton did not follow through in being evaluated for splint therapy. (R. 702)

33. It was Dr. Cosby's "feeling conservative treatment would be all that would be needed. Most likely, splint therapy would alleviate most of the myalgia and symptoms of TMJ dysfunction which [Dalton] is experiencing."

34. Dr. Mikesell testified that splint therapy would cost "around \$300 to \$400." (R. 834)

35. Dalton did not obtain splint therapy when recommended by Dr. Cosby and his TMJ condition became worse. (R. 838)

36. When Dalton was examined by Dr. Cosby, Dalton's mouth opening was in the range of normal. (R. 845)

37. When Dalton was examined by Dr. Cosby, there was no clicking or popping of the jaw to palpation. (R. 846)

38. It did not appear from Dr. Mikesell's examination that Dalton followed any of the recommendations set forth by Dr. Cosby. (R. 850)

39. Even at the time of trial, Dr. Mikesell would begin treatment conservatively and only if Dalton's condition did not respond would surgery be considered. (R. 850)

40. Dr. Cosby's bill to Dalton's attorney was \$65.00 for the examination and \$200 for the report sent to Dalton's attorney; the report is an

expense of litigation, not a medical bill. (R. 240, Dr. Cosby's itemization of charges and payments.)

41. Dalton's past medical expenses equal \$2,703.24, which represents the \$2,903.24 figure presented by Dalton at trial, less \$200 for Dr. Cosby's report to Dalton's attorney.

42. If one were to add \$300.00 for conservative splint therapy treatment for future special damages to the past medical special damages, the total special damage figure would be within \$3.24 of the jury's special damage award of \$3,000.00.

43. The plaintiff was examined by Dr. E. Warren Stadler, an expert in the area of physical rehabilitation, on February 22, 1993. (R. 864)

44. At the time of Dr. Stadler's examination, Dalton had a full range of motion of the cervical spine without weakness in the upper extremity or the neck area. (R. 869)

45. Dr. Stadler's examination found decreased sensation in Dalton's right index finger and on the right facial area around the right eye. (R. 869, 872)

46. Dalton's loss of sensation is caused by a nerve problem. (R. 873)

47. Dr. Stadler's examination found Dalton's facial fractures to be well healed. (R. 872)

48. Dr. Stadler did not place any limitation on Dalton's activities of daily living. (R. 873)

49. Dr. Stadler did not feel that surgical intervention on Dalton would be helpful with regard to his knee, his neck, his shoulder, his arm or with regard to his facial injuries. (R. 872-877)

50. Surgery would not be helpful in reestablishing the sensory patterns for nerve problems experienced by Dalton. (R. 873)

51. There was no need to dispute the evidence of the cost of the plaintiff's possible future surgeries because there was direct evidence that such surgeries would not be necessary or helpful.

52. Had the plaintiff followed Dr. Cosby's advice in December of 1991 and obtained splint therapy, his symptoms of TMJ dysfunction would have been alleviated; no surgery to relieve those symptoms would have been necessary.

53. Dr. Stadler testified as follows:

Q: Now, with that, do you have an opinion as to how well-healed this individual was with regard to the fractures he experienced in his face?

A: Yes.

Q: And what was that opinion?

A: I feel that the fractures would be well-healed.

Q: Did you feel that there would be a need at the time for any type of surgical intervention with regard to the facial fractures?

A: No, I would not. (R. 873).

54. Dr. Stadler further testified:



Q: What is your opinion as to whether surgery would be necessary or helpful in regard to the nerve injury in the face?

A: My opinion is that surgery would not be helpful.  
(R. 876)

### **SUMMARY OF THE ARGUMENT**

Dalton takes the position that an appellate court in the State of Utah is not allowed to view the evidence and reasonable inferences drawn therefrom in the light most favorable to the jury's verdict when considering whether a trial court has appropriately awarded an additur. That position has no foundation in Utah case law. Dalton, however, attempts to so construe the language set forth in *Crookston*. The plain language in *Crookston*, however, clearly supports the action taken by the Utah Court of Appeals in this case.

In deciding whether to grant a new trial, a trial court has some discretion, and we reverse only for abuse of that discretion. In passing on a motion for a j.n.o.v., however, a trial court has no latitude and must be correct. Appellate review of a trial court's *denial* of either motion based on a claim of insufficiency of the evidence, however, is governed by one standard because of the differing degrees of discretion we accord trial courts in ruling initially on these motions. Under that standard, we reverse only if, viewing the evidence in the light most favorable to the prevailing party, the evidence is insufficient to support the verdict.

*Crookston* at 799.

In the case at hand, the trial court did more than grant a new trial. A new trial would allow evidence to be presented once again to a jury. The trial court's additur, on the other hand, replaces the jury's verdict with the court's own judgment. In that light, an additur is far more similar to a judgment

notwithstanding the verdict than a granting of a new trial. Accordingly, the trial court has no latitude and must be correct.

## **ARGUMENT**

### **I**

#### **THE JURY'S VERDICT MUST STAND BECAUSE THE EVIDENCE FAILS TO SO CLEARLY PREPONDERATE IN FAVOR OF DALTON THAT REASONABLE PEOPLE WOULD NOT DIFFER ON THE OUTCOME OF THE CASE**

The right to a jury trial in civil cases is fundamental. That right is at the very heart of our judicial system. It is expressly set forth in the Constitution of this state. Utah Constitution, Article I, Section 10. Accordingly, the decisions rendered by juries must be protected by this court. This court cannot allow trial judges to ignore unanimous decisions of eight jurors based on their reasonable interpretation of the evidence and substitute the trial judge's own point of view. In reviewing a trial court's decision to substitute its own judgment for that of the jury's verdict, an appellate court must have the ability to review the record of the trial and the jury's verdict. Only then, can an appellate court determine whether a litigant's constitutional right to have a jury of his peers render judgment on his case.

In the recent case of *Pratt v. Prodata, Inc.*, 885 P.2d 786 (Utah 1994), the Supreme Court of Utah re-emphasized the "well-established principal of appellate review" which endorses the American system of jury trials. This court stated on page 788 of that case the following:

This court will upset a jury verdict 'only upon a showing that the evidence so clearly preponderates in favor of the appellant that reasonable people would not differ on the outcome of the case.' (Citing *E.A. Strout W. Realty Agency*,

*Inc. v. W. C. Foy and Sons, Inc.*, 665 P.2d 1320, 1322 (Utah 1983); accord *Bundy v. Century Equip. Co.*, 692 P.2d 754, 758 (Utah 1984).

Herold urges this court to stand by the well-recognized standard of appellate review and only allow trial judges to entertain a motion for additur when the damages are "so inadequate as to indicate a disregard of the evidence by the jury." *Dupuis v. Neilson*, 624 P.2d 685, 686 (Utah 1981). The trial court erred in granting Dalton's motion for additur and that decision should not be allowed to stand. The trial court was wrong when it stated in its memorandum decision that the award for special damages rendered by the jury did not bear a reasonable relationship to the evidence. It is true that the plaintiff presented evidence alleging that his past medical bills totaled \$2,903.24. It was pointed out to the jury that \$200.00 of that amount, however, was for a letter sent by Dalton's expert, Dr. Crosby, to Dalton's attorney. Accordingly, the past medical bills actually totaled \$2,703.24. If the conservative treatment, which was estimated at \$300.00, were to have been undertaken by the plaintiff, the total special damages would be \$3,003.24. Certainly, that amount bears "a reasonable relationship to the evidence."

The trial court did recognize in its memorandum decision that Dr. Warren Stadler testified at trial. While it is true that Dr. Stadler, a physician who does not perform surgery, did not address the cost of future surgeries, he specifically testified that no future surgery would be necessary or helpful. Dalton continues to pursue the red herring and claim that Dr. Stadler's testimony should be ignored because he is not a surgeon. That issue was

addressed by the trial court when Dalton's attorney objected to Stadler's testimony at trial by stating: "I believe it goes to the weight, versus the admissibility. The objection is overruled, you may answer the question if you remember it ... ." (R. 876)

It should be pointed out that both Dalton and the trial court seem to ignore the fact that Dalton was first examined for TMJ type symptoms by Dr. Michael P. Crosby in Denver, Colorado on December 26, 1991. (Dalton did not see Dr. Mikesell, his second expert in the area of oral and maxiofacial surgery, until shortly before the trial on February 23, 1993.) Dr. Crosby's letter to Dalton's attorney dated December 26, 1991, attached hereto as Exhibit "1", clearly states that Dalton failed to mitigate his damages and that future surgery would not have been necessary if Dalton had taken care of his problem in a timely fashion. Dr. Crosby stated: "It is my feeling conservative treatment would be all that would be needed." The conservative treatment would only cost \$300.00.

The evidence presented to the jury overwhelmingly proved that Dalton failed to mitigate his damages. He had not received any medical treatment and had not followed through with any of his doctors' recommendations. Not only was there medical testimony that the surgeries were not necessary and would not be helpful, the jury reasonably inferred that the surgeries, as required in jury instruction number 44, that the surgeries would not have been required and given in the future.

## **II**

### **THERE IS NO REASONABLE BASIS FOR THE TRIAL COURT SUBSTITUTING ITS JUDGMENT IN FAVOR OF THE JURY'S VERDICT.**

In its memorandum decision, the trial court determined that the jury's verdict was "manifestly contrary to the weight of the evidence." The Court of Appeals correctly determined that the "trial court should never had considered the motion for additur since the record does not show that the jury disregarded the evidence." There is no reasonable basis for the trial court's decision.

Under any conceivable standard, this court cannot allow an incorrect decision by a trial judge to stand.

## **III**

### **THE PETITIONER'S ARGUMENT REGARDING HIS THEORY AS TO THE CORRECT STANDARD OF REVIEW WAS REPEATEDLY AND ADEQUATELY PRESENTED IN HIS BRIEFS**

The Utah Rules of Appellate Procedure were recommended by the Advisory Committee on Appellate Rules and approved by the Utah Supreme Court. Those rules became effective on April 1, 1990. The Advisory Committee note indicates that prior to the adoption of Rule 29 of the Utah Rules of Appellate Procedure, that the "practice was to presume that argument was waived unless requested." Certainly, this court has determined that the Utah Rules of Appellate Procedure meet constitutional scrutiny. There is no doubt that the petitioner's constitutional right was not violated when the Utah

Court of Appeals determined that the trial court erred in granting the Dalton's motion for additur.

There is no need for the appellate court to allow oral argument when the "facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly added by oral argument." Rule 29 (a)(3) of Appellate Procedure. On page 1 of the brief of appellee, the petitioner attacks this respondent's standard of review and sets forth his theory. Of course, that theory is the theme of Dalton's arguments throughout his extensive briefing. The petitioner, in his initial brief, cites *Crookston* in support of his position no less than six times. The emphasis continued in his petition for rehearing. Point I of that petition maintains that the Court of Appeals misunderstands the law.

In light of all the emphasis by Dalton in his briefs before the Utah Court of Appeals, it is hard to imagine that oral argument would have aided in the slightest degree in persuading the Court of Appeals to change its decision and apply an unsupported theory which has been set forth by the petitioner. In addition, the record is clear that conflicting medical evidence on the necessity of future surgeries was presented to the jury. Unfortunately, that evidence was not appropriately marshaled by Dalton and ignored by the trial court. Oral argument obviously would not have persuaded the Court of Appeals to act contrary to the law and examine the trial court's memorandum decision in a vacuum without considering the evidence and the jury's reasonable inferences drawn therefrom, as is being urged by Dalton.

### CONCLUSION

Herold urges this court to announce a standard of review for cases involving an additur by the trial court that gives deference to the jury's verdict. In the case at hand, however, under any possible standard of review, the trial court's additur should be stricken and the jury's verdict reinstated.

DATED this 24th day of May, 1996.

DUNN & DUNN

A handwritten signature in cursive script, appearing to read 'Mark Dalton Dunn', written over a horizontal line.

MARK DALTON DUNN  
KEVIN D. SWENSON  
Attorneys for Defendant/Respondent

**CERTIFICATE OF HAND-DELIVERY**

I hereby certify that two true and correct copies of the foregoing Appeal From A Memorandum Decision of the Utah Court of Appeals, was hand-delivered this 24th day of May, 1996, to the following:

George T. Waddoups  
ROBERT J. DEBRY & ASSOCIATES  
4252 South 700 East  
Salt Lake City, Utah 84107

Attorney for Plaintiff

DUNN & DUNN

A handwritten signature in dark ink, appearing to read 'Mark Dalton Dunn', is written over a horizontal line.

MARK DALTON DUNN  
KEVIN D. SWENSON  
Attorneys for Petitioner/Respondent



**A-1**

whichever is applicable. Any such motion which is filed before expiration of the prescribed time may be ex parte, unless the Supreme Court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(f) The number of copies to be filed and served shall be the same as provided in Rule 26.

(Amended effective October 1, 1992.)

**Amendment Notes** — The 1992 amendment, effective October 1, 1992, in Subdivision (a) inserted "final" in the first sentence and added the second sentence, in Subdivision (b)

substituted all the language after "which is" for "jurisdictionally out of time" added Subdivisions (d)(3), (d)(4), and (f), and made a stylistic change.

#### NOTES TO DECISIONS

##### ANALYSIS

Procedural default.

—Cause

Procedural default.

—Cause

Petitioner seeking federal habeas review sufficiently alleged "cause" for his procedural de-

fault under this rule when he claimed that, due to his incarceration in Nevada, he had no reasonable access to, or notice of, Utah appellate rules and, thus, he should be afforded the opportunity to prove that these circumstances did in fact exist for purposes of excusing the default. *Dulin v. Cook*, 957 F.2d 758 (10th Cir. 1992).

#### Rule 49. Petition for writ of certiorari.

(a) **Contents.** The petition for a writ of certiorari shall contain, in the order indicated:

(1) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in the Supreme Court contains the names of all parties.

(2) A table of contents with page references.

(3) A table of authorities with cases alphabetically arranged and with parallel citations, agency rules, court rules, statutes, and authorities cited, with references to the pages of the petition where they are cited.

(4) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. General conclusions, such as "the decision of the Court of Appeals is not supported by the law or facts," are not acceptable. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition or fairly included therein will be considered by the Supreme Court.

(5) A reference to the official and unofficial reports of any opinions issued by the Court of Appeals.

(6) A concise statement of the grounds on which the jurisdiction of the Supreme Court is invoked, showing:

(A) the date of the entry of the decision sought to be reviewed,

(B) the date of the entry of any order respecting a rehearing and the date of the entry and terms of any order granting an extension of time within which to petition for certiorari,

(C) reliance upon Rule 47(c), where a cross petition for a writ of certiorari is filed, stating the filing date of the petition for a writ of certiorari in connection with which the cross petition is filed, and

(D) the statutory provision believed to confer jurisdiction on the Supreme Court.

(7) Controlling provisions of constitutions, statutes, ordinances, and regulations set forth verbatim with the appropriate citation. If the controlling provisions involved are lengthy, their citation alone will suffice

and their pertinent text shall be set forth in the appendix referred to in subparagraph (10) of this paragraph.

(8) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of the proceedings, and its disposition in the lower courts. There shall follow a statement of the facts relevant to the issues presented for review. All statements of fact and references to the proceedings below shall be supported by citations to the record before and to the opinion of the Court of Appeals.

(9) With respect to each question presented, a direct and concise argument explaining the special and important reasons as provided in Rule 46 for the issuance of the writ.

(10) An appendix containing, in the following order:

(A) copies of all opinions, including concurring and dissenting opinions, and all orders, including any order on rehearing, delivered by the Court of Appeals in rendering the decision sought to be reviewed,

(B) copies of any other opinions, findings of fact, conclusions of law, orders, judgments, or decrees that were rendered in the case or in companion cases by the Court of Appeals and by other courts or by administrative agencies and that are relevant to the questions presented. Each document shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of its entry, and

(C) any other judicial or administrative opinions or orders that are relevant to the questions presented but were not entered in the case that is the subject of the petition.

If the material that is required by subparagraphs (7) and (10) of this paragraph is voluminous, they may be separately presented.

(b) **Form of petition.** The petition for a writ of certiorari shall comply with the form of a brief as specified in Rule 27.

(c) **No separate brief.** All contentions in support of a petition for a writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph (a)(9) of this rule. The petitioner shall not file a separate brief in support of a petition for a writ of certiorari. If the petition is granted, the petitioner will be notified of the date on which the brief in support of the merits of the case is due.

(d) **Page limitation.** The petition for a writ of certiorari shall be as short as possible, but may not exceed 20 pages, excluding the subject index, the table of authorities, any verbatim quotations required by subparagraph (a)(7) of this rule, and the appendix.

(e) **Absence of accuracy, brevity, and clarity.** The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to a read and adequate understanding of the points requiring consideration will be sufficient reason for denying the petition.

(Amended effective October 1, 1992.)

**Amendment Notes** — The 1992 amendment, effective October 1, 1992, deleted language from Subdivision (b) relating to cover color and requiring the clerk to return nonconforming petitions, in Subdivision (c) deleted

"and the clerk will refuse to file any petition for a writ of certiorari to which is annexed appended any supporting brief" from the end of the second sentence and added the third sentence, and made several stylistic changes.

#### Rule 50. Brief in opposition; reply brief; brief of amicus curiae.

(a) **Brief in opposition.** Within 30 days after service of a petition the respondent shall file an opposing brief, disclosing any matter or ground with which the case should not be reviewed by the Supreme Court. Such brief shall comply with Rules 26(b), 27 and, as applicable, 49.



occasions over an extended period of time and while in a position of trust toward the victim. *State v. Copeland*, 765 P.2d 1266 (Utah 1988).

The fact that defendant, who was convicted of sodomy on a child, was a victim of sexual abuse as a child did not make the imposition of a ten-year minimum mandatory sentence cruel punishment as applied to him in contrast to other offenders. *State v. Bastian*, 765 P.2d 902 (Utah 1988).

#### Excessive fines.

When a nonprofit corporate club violated the former Liquor Control Act several times by selling intoxicating drinks to a police officer and his wife over a three-week period, and the club was convicted of three separate violations, the imposition of three maximum \$2,500 fines (making the total fine \$7,500) was excessive since the officer and his wife were engaged in a single mission over the three-week period, and the drinks served them during that period con-

stituted a single continuing violation. *State v. Starlight Club*, 17 Utah 2d 174, 406 P.2d 912 (1965).

#### Juvenile proceedings.

This section has application to criminal cases where a presumption of innocence prevails and does not apply to the proceedings in juvenile courts where incorrigible or delinquent children are being trained and their habits corrected since juvenile court proceedings are civil and not criminal. *Donald R. v. Whitmer ex rel. Salt Lake County*, 30 Utah 2d 206, 515 P.2d 617 (1973).

#### Voir dire examination.

Individual, sequestered death-qualification voir dire of prospective jurors in a capital homicide case does not, in and of itself, violate the defendant's rights to a fair and impartial jury. *State v. Shaffer*, 725 P.2d 1301 (Utah 1986).

#### COLLATERAL REFERENCES

Utah Law Review. — The Courts, the Constitution, and Capital Punishment, 1968 Utah L. Rev. 201.

Am. Jur. 2d. — 8 Am. Jur. 2d Bail and Recognizance § 74.

C.J.S. — 8 C.J.S. Bail § 69, 22 C.J.S. Criminal Law § 24 et seq.

A.L.R. — Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 A.L.R.4th 367.

Key Numbers. — Bail \* 7.

### Sec. 10. [Trial by jury.]

In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

History: Const. 1896.

Cross-References. — Civil actions, right to jury trial in, U.R.C.P., Rules 38, 39.

#### NOTES TO DECISIONS

##### ANALYSIS

Abatement of nuisance.  
Capital cases.  
Civil cases.  
—Nature of issue.  
Concurrence of three-fourths of jurors.  
Consolidation of actions.  
Guilty plea.  
Judge's abrogation of jury's function.  
Jury selection.  
Injunction.  
Nonsuit.

Number of jurors.  
Paternity proceedings.  
Request for jury trial.  
Reversal of verdict.  
Unanimous verdict.  
Waiver of jury trial.

#### Abatement of nuisance.

Former section regarding abatement of brothel as nuisance, insofar as it provided for imprisonment and authorized court in equity proceedings to impose jail sentence, held unconstitutional as violating this section. *State*

*ex rel. Pincock v. Franklin*, 63 Utah 442, 226 P. 674 (1924).

#### Capital cases.

Since the term "capital cases" as used in this section refers to a category of criminal actions, including the entire prosecution and not merely the penalty phase, the U.S. Supreme Court decision in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), affected only the punishment and not the nature of the crime, defendant accused of "capital offense" was entitled to be tried by a twelve-man jury. *State v. James*, 30 Utah 2d 32, 512 P.2d 1031 (1973).

#### Civil cases.

This section guarantees the right of jury trial in civil cases. *International Harvester Credit Corp. v. Pioneer Tractor & Implement, Inc.*, 626 P.2d 418 (Utah 1981).

The constitutional right to a jury trial in civil cases extends only to cases that would have been cognizable at law at the time the constitution was adopted. *Zions First Nat'l Bank v. Rocky Mt. Irrigation, Inc.*, 138 Utah Adv. Rep. 12 (1990).

When legal and equitable issues turn on the same operative facts, a jury must decide the legal issue first; the jury's factual determination binds the trial court in its determination of the parallel equitable issue. *Zions First Nat'l Bank v. Rocky Mt. Irrigation, Inc.*, 138 Utah Adv. Rep. 12 (1990).

#### —Nature of issue.

Where a party's claims on consolidation were realigned into affirmative defenses and counterclaims, this realignment did not change the nature of any issue from legal to equitable. Thus, the party should have been afforded its right to a jury trial on the legal issue. *Zions First Nat'l Bank v. Rocky Mt. Irrigation, Inc.*, 138 Utah Adv. Rep. 12 (1990).

#### Concurrence of three-fourths of jurors.

In eminent domain proceedings, where, during polling of jury, one juror answered that he did not concur in verdict and that he was not given sufficient time to deliberate, court did not err in refusing to grant new trial because poll revealed six jurors did concur in verdict. *State ex rel. Road Comm'n v. Jensen*, 22 Utah 2d 214, 451 P.2d 370 (1969).

#### Consolidation of actions.

An order for consolidation, for the determination of liability only, of eleven actions involving nineteen plaintiffs, claiming damages for trichinosis contracted by eating sausage prepared and sold by defendants did not violate this provision. *Raggenbuck v. Suhrmann*, 7 Utah 2d 327, 325 P.2d 258 (1969).

#### Guilty plea.

A defendant may effectively enter a plea of

guilty to any offense, including murder, and such plea certainly waives a jury trial. Just because the defendant has an inviolate constitutional right does not mean he is forced to accept it. *State v. Maguire*, 529 P.2d 421 (Utah 1974).

#### Judge's abrogation of jury's function.

Constitutional provision granting to accused persons right to trial by jury extends to all of the facts that must be found to constitute the crime charged, and the right may not be invaded by the judge indicating to the jury that any of such facts are established by the evidence. *State v. Estrada*, 119 Utah 339, 227 P.2d 247 (1951).

#### Jury selection.

Defendant's allegation without further proof that jurors in murder trial probably were selected only from assessment roll of real property owners did not establish that defendant was deprived of right to trial by impartial jury. *State v. Johnson*, 25 Utah 2d 46, 475 P.2d 543 (1970).

#### Injunction.

In proceedings to obtain injunction, in absence of statute to contrary, there is no right to trial by jury. *Riggins v. District Court*, 89 Utah 163, 51 P.2d 645 (1935).

#### Nonsuit.

Judgment of nonsuit does not deprive plaintiff of his constitutional right to jury trial where facts undisputably show that plaintiff is not entitled to relief. *Raymond v. Union Pac. R.R.*, 113 Utah 26, 191 P.2d 137 (1948).

#### Number of jurors.

Trial by eight jurors, as provided in this section, instead of twelve did not deprive defendant in grand larceny proceeding of his rights under the Sixth and Fourteenth Amendments of the United States Constitution. *Johnson v. Turner*, 429 F.2d 1152 (10th Cir. 1970).

In jury trial for noncapital offense defendant effectively waived trial by jury of eight by agreeing in open court to proceed with seven jurors after one had become ill. *State v. Heemer*, 25 Utah 2d 69, 475 P.2d 1008 (1970).

In a trial de novo on appeal from the city court to the district court the number of jurors is four. *Salt Lake City v. West Gallery, Inc.*, 573 P.2d 1283 (Utah 1978).

Defendants charged with driving under the influence of alcohol, a class B misdemeanor with maximum possible imprisonment of six months, had no federally protected right to jury trial, and therefore could claim no right to six-member panel as opposed to four-member juries which convicted them. *State v. Nuttall*, 611 P.2d 722 (Utah 1980).

#### Paternity proceedings.

There is no inherent constitutional right to a

trial by jury in paternity proceedings in this state. *Hyatt v. Hill*, 714 P.2d 299 (Utah 1986).

#### Request for jury trial.

Where application for jury trial was not timely filed and no excuses were alleged or shown explaining failure, there was no abuse of discretion on the part of the court in denying the belated request. *Board of Educ. v. West*, 55 Utah 357, 186 P. 114 (1919).

In action at law to establish prescriptive easement, where plaintiff also asked for injunctive relief, trial court erred in refusing timely request for jury trial. *Norback v. Board of Dirs.*, 84 Utah 506, 37 P.2d 339 (1934).

Demand for jury trial was not defective because it failed to specify issues upon which jury trial was desired, where there was no statutory requirement that issues be specified. *Valley Mortuary v. Fairbanks*, 119 Utah 204, 225 P.2d 739 (1950). (For present law, see U.R.C.P., Rule 38(b).)

#### Reversal of verdict.

Where the facts indisputably establish no right to relief, the reversal by the Supreme Court of a judgment entered on a verdict in favor of the plaintiff does not deprive the plaintiff of his constitutionally guaranteed right to a trial by jury. *Creamer v. Ogden Union Ry. & Depot Co.*, 121 Utah 406, 242 P.2d 575 (1952), cert. denied, 344 U.S. 912, 73 S. Ct. 333, 97 L. Ed. 703 (1953).

#### Unanimous verdict.

A jury does not have to be unanimous in deciding which of the three culpable mental states it finds in convicting of second-degree murder, as long as the decision is unanimous that one or another form of second-degree murder was committed. *State v. Russell*, 733 P.2d 162 (Utah 1987); *State v. Standiford*, 769 P.2d 254 (Utah 1988).

Where defendant was convicted of first-degree murder, and the jury was instructed disjunctively as to the alternative evaluating circumstances aggravating the offense, jury unanimity on the evaluating circumstances was not required, the record having shown substantial evidence to support all of the alternatives set forth in the instructions. *State v. Tillman*, 750 P.2d 546 (Utah 1988).

#### COLLATERAL REFERENCES

Utah Law Review. — Right to Civil Jury Trial in Utah: Constitution and Statute, 8 Utah L. Rev. 97.

Due Process Standard of Jury Impartiality Precludes Death-Qualification of Jurors in Capital Cases, 1969 Utah L. Rev. 154.

No-Fault Automobile Insurance in Utah —

#### Waiver of jury trial.

Statute providing that demand was necessary for trial by jury was not in conflict with last provision in this section. *State ex rel. Nichols v. Cherry*, 22 Utah 1, 60 P. 1103 (1900). (For present law, see U.R.C.P., Rule 38(b).)

Where claimant to property sued to quiet title, or in ejectment, his failure to demand jury trial waived right thereto. *Gibson v. McGurrian*, 37 Utah 158, 106 P. 669 (1910).

Under this section, court may, of its own motion, direct that a jury be impaneled, and the case be submitted to them in the usual way, even though both parties expressly waive a jury. *Ogden Valley Trout & Resort Co. v. Lewis*, 41 Utah 183, 189, 125 P. 687 (1912).

The provision that a jury is waived unless demanded is not for the benefit of an adversary; therefore where a jury is in fact present, the adverse party cannot successfully object to a jury trial, and court may waive untimely demand and payment of jury fee. *Davis v. Denver & R.G.R.R.*, 45 Utah 1, 142 P. 705 (1914).

Where defendant not only failed to demand a jury trial, but minutes show that when plaintiffs demanded a jury for determination of questions of damages, in suit to enjoin a nuisance and for damages, defendant resisted such demand, this amounts to a waiver of a jury trial. *Ludlow v. Colorado Animal By-Products Co.*, 104 Utah 221, 137 P.2d 347 (1943).

Under this section a jury trial in civil actions is waived unless demanded, and even then, unless the demand is made in the manner provided by statute, it is unavailing. *Thompson v. Anderson*, 107 Utah 331, 153 P.2d 665 (1944).

Court on its own motion could have called jury to try personal injury case. *Hunter v. Michaelis*, 114 Utah 242, 198 P.2d 245 (1948).

Jury trial was not waived because demand therefor was general and failed to specify the issues upon which jury trial was desired. *Valley Mortuary v. Fairbanks*, 119 Utah 204, 225 P.2d 739 (1950).

There is no constitutional right to be tried without a jury; waiver of right to jury trial may be permitted in some instances, but defendant could not complain of trial judge's refusal to dismiss jury at the close of state's evidence. *State v. Black*, 551 P.2d 518 (Utah 1976).

State Constitutional Issues, 1970 Utah L. Rev. 248.

Restraints on Defense Publicity in Criminal Jury Cases, 1984 Utah L. Rev. 45.

Recent Developments in Utah Law, 1986 Utah L. Rev. 95, 199.

Comment, The Utah Supreme Court and the

Utah State Constitution, 1986 Utah L. Rev. 319.

Recent Developments in Utah Law — Judicial Decisions — Criminal Law, 1988 Utah L. Rev. 177.

Am. Jur. 2d. — 47 Am. Jur. 2d Jury § 7 et seq.

C.J.S. — 50 C.J.S. Juries § 9 et seq.

A.L.R. — Driving while intoxicated or similar offense, right to trial by jury in criminal prosecution for, 16 A.L.R.3d 1373.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 A.L.R.3d 1321.

Issues in garnishment as triable to court or to jury, 19 A.L.R.3d 1393.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 A.L.R.4th 367.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Paternity proceedings: right to jury trial, 51 A.L.R.4th 565.

Right to jury trial in action for retaliatory discharge from employment, 52 A.L.R.4th 1141.

Right to jury trial in state court divorce proceedings, 56 A.L.R.4th 955.

Jury trial rights in, and on appeal from, small claims court proceeding, 70 A.L.R.4th 1119.

Key Numbers. — Jury § 9 et seq.

## Sec. 11. [Courts open — Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

History: Const. 1896.

#### NOTES TO DECISIONS

##### ANALYSIS

#### Action under Civil Rights Act of 1871.

Actions by court.

Actions by state.

Actions not created.

Arbitration Act.

Assignments.

Attorneys' duties.

Criminal law.

—Suspension of execution of death sentence.

Debt collection.

District court jurisdiction.

Election contest.

Forum non conveniens.

Injury or damage to property.

Intoxicating liquor.

Land Registration Act.

Limitations.

—Limitations of actions.

—Statutory limitation of review.

Occupational disease law.

Sovereign immunity.

Torts.

—Action by wife against husband.

—Loss of consortium.

Unlicensed law practice.

Waiver of rights.

Workmen's compensation law.

Cited.

#### Action under Civil Rights Act of 1871.

Jurisdiction over actions brought under the Civil Rights Act of 1871, 42 U.S.C. 1981 et seq., is vested originally in the federal courts, but the exercise of concurrent jurisdiction by state courts is not thereby prohibited; in view of the provisions of this section, therefore, it was error for trial court to dismiss for lack of jurisdiction otherwise proper action brought under 42 U.S.C. 1983. *Kish v. Wright*, 562 P.2d 625 (Utah 1977).

Trial court would not err in dismissing action brought under 42 U.S.C. 1983 on the ground of forum non conveniens in a proper case, but such dismissal should be without prejudice so that the plaintiff might move his suit to another forum without harm to his claim. *Kish v. Wright*, 562 P.2d 625 (Utah 1977).

#### Actions by court.

Court of equity has jurisdiction to open probate proceeding and to proceed against bond of administratrix where she has practiced extrinsic fraud on the court. *Weyant v. Utah Sav. & Trust Co.*, 54 Utah 181, 182 P. 189, 9 A.L.R. 1119 (1919).

#### Actions by state.

This section did not alter the law with respect to certain rights which are vested in the